Supreme Court, U.S.
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No. 99-1009

In The

Supreme Court of the United States

SUE HARRIS DEBAUCHE,

Petitioner,

v.

EUGENE P. TRANI, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENT EUGENE P. TRANI'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Under *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557 (1995), private citizens engaged in speech may exclude, from their events, messages they do not wish to make, even when those events are held on public property. The debate at issue here was held at a public university, but the selection of participants was made by a private citizen. Was the Fourth Circuit correct when it concluded that the university president had no constitutional duty to insist that the petitioner be included as a participant?

2. The petitioner contends that the university president violated her First Amendment rights under *Arkansas Educational Television Comm'n v. Forbes*, 523 U.S. 666 (1998), because she was not included in the debate held at his institution. Assuming *arguendo* that this is so, was the Fourth Circuit correct when it concluded that the president, in his individual capacity, is entitled to qualified immunity?

3. *Ex parte Young*, 209 U.S. 123 (1908), allows an injunction against a state official only when there is a continuing violation of federal law. The petitioner alleged only an isolated violation, not a continuing one. Was the Fourth Circuit correct when it ruled that, under such circumstances, the doctrine of *Ex parte Young* does not apply?

QUESTIONS PRESENTED – Continued

4. Given petitioner's failure to allege a continuing violation, the availability of qualified immunity and the unlikelihood that the events alleged will be repeated, is this case moot?

[The petition for writ of certiorari also raises issues relating to the award of legal fees against her and her counsel. Those issues do not affect this respondent.]

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BRIEF OF EUGENE P. TRANI, PRESIDENT OF VIRGINIA COMMONWEALTH UNIVERSITY, IN OPPOSITION

Respondent, Dr. Eugene P. Trani, President of Virginia Commonwealth University, respectfully submits this brief in opposition to the petition for a writ of certiorari.

INTRODUCTION

Petitioner attempts to invoke *Arkansas Educational Television Comm'n v. Forbes*, 523 U.S. 666 (1998). But, this case is not about a *government* decision to limit participation in a debate. It is about the right of *private* parties to determine the content of their own messages even when delivered from a public stage. It is not governed by *Forbes*, but by *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557 (1995). Even if *Forbes* were controlling, the record would not permit the inference that the petitioner was excluded because of her viewpoint. Moreover, *Forbes* was not decided until after the events that transpired here. Thus, this respondent is entitled to qualified immunity, as the Fourth Circuit correctly decided. This respondent also has sovereign immunity under the Eleventh Amendment, especially since no ongoing constitutional violation is alleged. If these are not sufficient reasons to deny the writ, this case – which was moot the day it was filed – continues to be a hopelessly moot request for an advisory opinion about the past actions of a state official.

STATEMENT OF THE CASE

In her Statement of the Case, the petitioner, Sue Harris DeBauche, omits several significant facts that appear in her amended complaint or in the voluminous materials submitted by her to the district court in opposition to the motion to dismiss.[1] Those facts show that the choice of participants in the debate was not made by government and, in any event, the choice was made long before DeBauche made her belated entry into the gubernatorial race. A. 88-89. Additionally, DeBauche was offered use of the same university resources that were made available to the candidates of the two major parties. A. 156. She chose to decline them.

A former Governor of Virginia,[2] L. Douglas Wilder spoke to public issues in 1997 from his radio program on WRVA, a major radio station in Richmond. In the spring of that year, Wilder invited the Republican and Democratic gubernatorial candidates – Jim Gilmore[3] and Don Beyer[4] – to appear in a debate to be held in October, 1997.

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[1] The petitioner submitted more than 100 pages of documents to the district court and has included portions of those materials in the Appendix, Volume II.

[2] Governor Wilder served as chief executive of the Commonwealth from 1990-1994, where he acquired national prominence, *inter alia*, as the first African-American to serve as the Governor of any State.

[3] Jim Gilmore was elected Attorney General of Virginia in 1993. He was unopposed for the 1997 Republican gubernatorial nomination.

[4] Don Beyer was elected Lt. Governor of Virginia in 1989 and in 1993. He was unopposed for the 1997 Democratic gubernatorial nomination.

The proposal called for the debate to be moderated by the former Governor and broadcast by WRVA. The two invited guests agreed and the debate was set. At this time, DeBauche was not a candidate. A. 87, 88.

Although there was agreement about the participants in the debate, other details still had to be arranged, including the location. By July 7, 1997, the three principals – Wilder, Gilmore and Beyer – agreed to hold the debate at Virginia Commonwealth University ("VCU"), a public university where the former Governor serves as a Distinguished Professor. VCU agreed to serve as a "sponsor" of the event – dubbed "Debate Virginia" – but, like the sponsors of most broadcast programs, VCU did not attempt to control program content. Moreover, the chief decision about content – the identity of the debate participants – had already been made without any involvement by VCU or its President, Eugene P. Trani. At the time VCU agreed to serve as sponsor, DeBauche was still not a candidate. A. 87.

As planning for the debate proceeded, the Reform Party was in turmoil. Its original candidate for governor was nominated in early June, 1997, but resigned that nomination later that same month. No replacement was found. In August, the Reform Party sought to entice Wilder to accept its nomination. He declined. Finally, in mid-September, DeBauche decided that she would run and the Reform Party gave her its nomination. This was her first bid for public office. By any objective standard, her candidacy was hopelessly belated. Yet, given the showing by its 1996 presidential candidate, Ross Perot, the Reform Party was entitled to a place on the ballot in 1997 without any need for its nominee to accumulate

signatures of support on petitions. Va. Code §§ 24.2-101 and 24.2-511(D).[5] Thus, despite her late entry into the race, DeBauche was "ballot eligible" and her name was placed on the November ballot.

Nominated on or about September 14, 1997, DeBauche wanted to be added as a participant in the debate, scheduled for October 6, and attempted to communicate that desire by telephone messages and e-mails directed to Wilder and to the VCU website. She did not, however, attempt to direct any such communication to Trani. Moreover, any decision to add debate participants was not the prerogative of VCU or Trani, but was the prerogative of the three principals – Wilder, Gilmore and Beyer – who were jointly bringing the program to VCU.

The debate went forward on October 6, as planned, with former Governor Wilder moderating the exchange between the two leading gubernatorial candidates, Gilmore and Beyer. DeBauche filed suit on October 15. On October 21, two weeks after the debate had come and gone, DeBauche finally wrote to Trani. She demanded that he "sponsor and manage" another debate for her benefit and requested that he "have Douglas Wilder moderate the debate" and that Trani "use the same amount of resources" as were used in the debate on October 6.

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[5] Virginia Code § 24.2-101 gave the Reform Party the rights of a "political party" because, in one of the "two preceding statewide general elections," its candidate "received at least ten percent of the total vote cast for [a] statewide office." Under Va. Code § 24.2-511(D), those rights include the right to automatic ballot access for party nominees without any requirement for the circulation of a petition.

Trani responded by attempting to correct DeBauche's misunderstanding about the role played by VCU and by offering her the same VCU resources that had been made available to the other candidates. In his letter to her of October 23, 1997, he stated:

> With all due respect you simply misunderstand the role played by VCU in connection with the debate. VCU often makes its facilities available for use in connection with events of probable interest to the university community or the public at-large. Our efforts to accommodate such events does not make VCU responsible for the choice of speakers or the content of their remarks.
>
> While we must decline your request that VCU sponsor a three-way gubernatorial debate between now and Election Day, you may wish to consider using the VCU Performing Arts Center or other VCU resources (e.g. VCU website, 1-800 tollfree number) in connection with an event for your own campaign, including any debate you may arrange with any other candidate. We will make every appropriate effort to accommodate any such request.

A 156.

DeBauche declined Trani's offer. The gubernatorial election was held on November 4, 1997. Gilmore won. DeBauche received less than 2% of the vote. On November 26, 1997, DeBauche amended her complaint, now claiming that, because she had not been included in the debate, the results of the election should be set aside.

The district court dismissed her case on April 13, 1998. It ruled, *inter alia*, that: (i) DeBauche failed to establish that her exclusion from the debate was a result of state action; (ii) DeBauche had no constitutional right to infringe upon Wilder's associational rights; (iii) Trani was entitled to qualified immunity; (iv) Trani in his official capacity was immune from suit under the Eleventh Amendment; and (v) *Ex parte Young* furnished no basis to sue Trani for prospective relief. DeBauche appealed to the Fourth Circuit, which also ruled against her. It held that: (i) the petitioner failed to state a viable theory of state action against Trani; (ii) Trani was entitled to qualified immunity; and (iii) since no ongoing violation of federal law was alleged, *Ex parte Young*, was not applicable to Trani. A.9 and 12-17. Although neither court adopted Trani's mootness argument, it remains a viable alternative basis by which to dispose of this case.

REASONS FOR DENYING THE WRIT

Petitioner offers no compelling reason for granting a writ of certiorari. This case does not involve a conflict among the circuits, nor has the court of appeals decided an important question of federal law that has not been, but should be, settled by this Court. Sup. Ct. Rule 10(a). Indeed, the petitioner makes no attempt to invoke either of these familiar reasons for granting certiorari. Instead, her primary charge appears to be that the court of appeals misapplied a rule set down by this Court in *Forbes, supra*, 523 U.S. 666 (1998). Such a basis for certiorari is "rarely granted" in any case. Sup. Ct. Rule 10. It is entirely inappropriate here because there was no misapplication of *Forbes*. This case is not about a government

decision to limit participation in a political debate. It is about the right of private parties to control their own messages even when delivered from a public stage. Thus, the case is not governed by *Forbes*, but by *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557 (1995) (unanimous decision) (upholding First Amendment right of Irish parade organizers to exclude a competing Irish group even though parade used public streets, police escort, and other public resources).

But even if this case were controlled by *Forbes*, the record – indeed, the face of the complaint – forecloses any inference that the petitioner was excluded from the debate because of her viewpoint. A. 89. When DeBauche finally became a candidate at the eleventh hour, it gave her no constitutional right to disrupt the debate plans that had been made months earlier.[6] *Forbes* should not be confused with *Waiting for Godot*.

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[6] Petitioner says that she should have been allowed to take additional discovery, though it is not clear how such discovery could have repaired the defect in the face of her complaint. Moreover, she had already obtained more than 100 documents through the use of *subpoena duces tecum* and had submitted them to the district court as part of her response to the motion to dismiss. That material further undermined her claim of viewpoint discrimination. The district court's decision to stay further discovery on January 26, 1998, was well within its discretion to manage the discovery process. The assertion of sovereign immunity and qualified immunity are legitimate bases on which to stay discovery. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Indeed, not even the petitioner claims that decision "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." Sup. Ct. Rule 10.

But even if an inference of viewpoint discrimination could be reached, Trani was still entitled to qualified immunity, as the court of appeals found. *Forbes* was not decided until after the 1997 gubernatorial campaign had ended. Before that decision, it was not clear how the constitutional rights of political candidates intersected with the authority of government actors to organize debates. Under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), Trani is entitled to qualified immunity. Any monetary recovery from him in his individual capacity is foreclosed.

Sovereign immunity is also available. Under *Ex parte Young*, 209 U.S. 123 (1908), sovereign immunity precludes monetary awards against state officials in their official capacities. Sovereign immunity can be pierced and an *injunction* entered, but even injunctive relief requires an ongoing violation of federal law. *Green v. Mansour*, 474 U.S. 64 (1985). Here there was no continuing course of conduct, only a single debate that had already ended.

Finally, petitioner's case suffers the additional defect of being moot. She is barred from any relief by the doctrines of qualified and sovereign immunity. Moreover, her case does not fit into the narrow category of being "capable of repetition yet evading review." *Los Angeles v. Lyons*, 461 U.S. 95 (1983). Even if one assumes that DeBauche will again seek public office, it is simply too far a stretch to assume that, when she does so, VCU will host a debate from which she will be excluded.

In sum, petitioner's request for certiorari is wholly without merit. Her petition should be denied.

I. The Choice of Speakers Was Not State Action.

The first defect in DeBauche's complaint against Trani is her failure to make a well-pled allegation of state action. This defect has two parts. First, she does not allege that Trani made the choice of debate participants. As her amended complaint concedes, this was a decision made by Wilder well before VCU became involved with the debate. A. 89. Second, she misunderstands the meaning of state action when she seeks to transform Wilder's private invitation into a government decision for which Trani could be held accountable. Such a transformation occurred, she theorizes, when Trani permitted access to VCU's facilities for the debate. She is simply wrong on the law. Not only does her theory fall short of alleging state action, it ignores the state's real duty here: to steer clear of "gerrymandering" the content of private speech that happens to take place on public property.

Stripped of any varnish, the petitioner's theory is that, because VCU hosted the debate and promoted it to a highly interested public, VCU – and Trani – are responsible for the content of the program. It is, however, well-established that "[m]ere approval of or acquiescence in the initiatives of a private party is [an insufficient basis for a finding of state action.]" *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). The support made available to the debate by VCU, whether the stage and lights, phone lines or student volunteers, is an insufficient basis on which to find that the content of the program was state action. Were it otherwise, then the use of city streets and police in *Hurley* would have made the City of Boston – rather

than the private organization – responsible for excluding gay Irishmen from that parade.

Simply put, state action is not measured by the pound. What is required is a functional analysis of what happened and who made it happen. The salient question is not how much Trani did to support the debate, but whether he was responsible for the conduct complained of, *i.e.*, the omission of DeBauche. As the Fourth Circuit recognized, the petitioner failed to allege that Trani played any role in Wilder's choice of speakers.[7] Since Trani had no authority to invite or reject speakers, the question of whether there was state action in that decision is foreclosed. How VCU may have promoted the debate after the participants were determined is simply irrelevant to that question.

To be sure, the petitioner might have pled a more promising case if VCU made its facilities available to Gilmore and Beyer, yet denied DeBauche access to those same university resources. This is not, however, the case she has pled nor could she have done so. As the record shows, Trani expressly offered her use of the VCU Performing Arts Center (where the debate was held) or "other VCU resources (e.g. VCU website, 1-800 toll free number) in connection with an event for [her] own campaign." A. 156. It was an offer she declined.

Finally, petitioner's hope that she might yet uncover hidden pathways of state action cannot substitute for a threshold factual allegation that any such governmental

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[7] *Compare, e.g.*, ¶¶ 20 and 25 of the amended complaint, A. 89.

action was, in fact, the cause or basis of her exclusion from the debate. *See NBC v. Communication Workers of Am.*, 860 F.2d 1022, 1025, 1026 (11th Cir. 1988) (No state action in NBC's exclusion from convention center because "City . . . neither encouraged nor coerced the exclusion of NBC" and "did not attempt to demonstrate that the city entered into the decision-making process which resulted in the decision to exclude NBC."). The Fourth Circuit correctly concluded that, since there was no factual allegation that DeBauche's exclusion was the result of actions by Trani, what additional facts DeBauche may have gleaned from further discovery about VCU's promotion of the debate was irrelevant.

II. The Choice of Speakers Was Not Viewpoint Discrimination.

Since Trani did not make the decision about which speakers to invite, he cannot be guilty of viewpoint discrimination. The Court need go no further. There are, however, at least three additional points that reinforce the conclusion that no viewpoint discrimination occurred.

First, as shown by the amended complaint, the arrangements for the debate – including the choice of participants – were completed five months before DeBauche became a candidate. A. 89. She was not the target of viewpoint discrimination. She was not even on the radar screen.

Second, while she was the only "ballot eligible" candidate not to take part in the debate, she was also the only one who waited so long to enter the race. *If* there had been another late entrant, and *if* he or she had been

invited to participate while DeBauche was left out, her case for discrimination might have been stronger. But those are not the facts here.[8]

Third, what the petitioner seems to argue is that Trani should have used his position with VCU to compel Wilder, Gilmore and Beyer to include her on their program. One problem with this theory is that there is no allegation that she directed any pre-debate communications to Trani. But, even had she done so, her theory would still fail. For Trani to force private speakers to accommodate another on their program would not have avoided constitutional problems; it would have created them.

Wilder's desire to produce and moderate a debate only between Gilmore and Beyer was well within his constitutional prerogative, as was the desire of Gilmore and Beyer to limit the event to one in which their speaking time and messages would not be diluted by a third candidate. Trani was not constitutionally entitled to compel Wilder, Beyer or Gilmore to associate with DeBauche merely because VCU made its campus and resources available to facilitate the debate. As the district court correctly observed, such compulsion may have seriously infringed on free speech and associational rights. A. 47.

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[8] Moreover, under *Forbes*, there is no obligation to treat all "ballot eligible" candidates the same. Where public officials sponsor a debate, they are entitled to make good faith, informed judgments about the newsworthiness of individual candidates. The very belated candidacy of an individual with no previous record of public office is probably not so newsworthy as to require inclusion even under *Forbes*.

See also opinion of court of appeals, A. 17. Giving petitioner a "right to march in someone else's parade" would have seriously undermined free speech values and the associational liberties of private citizens who use public venues for expressive activities. *Hurley*, 515 U.S. 557.

The activists who demanded access to the parade in *Hurley* sought to be associated with the popular Irish message of that parade and to graft their own message into the message of others. As this Court recognized, state intervention to alter private expression so as to render that expression more "acceptable" is a "decidedly fatal objective." *Hurley*, 515 U.S. at 579. The same is true here. The petitioner had no right to demand a seat alongside Wilder, Gilmore and Beyer, or to draw upon their visibility or popularity to enhance her own message.

As President of VCU, Trani's role in this case was not unlike the mayor of an "academic city" which issues "parade" permits. Diverse "parade" organizers seek to use university resources, whether it be for convocations, speakers' bureaus, symposia, workshops, town meetings, speeches, artistic exhibitions or political debates. Just as a city and its mayor cannot interfere with the parade organizers' decisions to include or exclude certain contingents, *Hurley*, 515 U.S. at 557, neither VCU nor Trani could interfere with Wilder's, Beyer's or Gilmore's choice to include or exclude certain persons from participating in their program.

DeBauche's demand for "contemporaneous equal access" is similar to what this Court sometimes refers to as "coerced access," a highly suspect demand regardless of the nature of the expressive medium or activity

involved. See, *Hurley*, 515 U.S. at 576; *Pacific Gas & Electric Co. v. Public Utilities Comm'n*, 475 U.S. 1 (1986) (invalidating coerced access to the envelopes of a private utility's bill); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (holding that a newspaper's choices of material, its decisions regarding size, content and treatment of public issues, fair or unfair, constitute free expression upon which the state may not intrude.) Under DeBauche's theory, the Christian student journalists in *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995), would have enjoyed the right to publish evangelical sentiments on the same pages as secular publications such as the "Yellow Journal" and to compete directly in the marketplace of ideas by conjoining and co-opting the journalistic messages of their competitors. DeBauche's theory, as applied to *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993), would mean that the community group who sought to show a James Dobson film on parenting would have enjoyed the right to exhibit and discuss the film in the middle of a Planned Parenthood meeting. That is precisely what *Hurley* and the First Amendment prohibit.

III. Dr. Trani is Entitled to Qualified Immunity.

If a public official's conduct is alleged to violate the Constitution, he is entitled to qualified immunity if the applicable constitutional standard was not well-settled at the time the conduct occurred. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). As Trani has already shown, his conduct in connection with the debate could be deemed unconstitutional only by a radical and unforeseeable change in

First Amendment jurisprudence. *See supra* at 9-14. Although the petitioner struggles to bring this case under the precedent of *Forbes*, that case does her no good. *Forbes* was not decided until 1998, the year after the events in question. *Forbes* holds that a public television station may exclude a political candidate based on its view that he was "non-newsworthy." There is nothing in *Forbes* to suggest that a more restrictive rule would apply to a public university, even if that university were responsible for the exclusion. Even less does *Forbes* weigh against Trani, who made no such decision to exclude. But even if *Forbes* could be read against Trani, the Court in that case was divided. "If judges disagree on a constitutional question, it is unfair to subject [Dr. Trani] to money damages merely for picking the losing side of the controversy." *Wilson v. Layne*, 526 U.S. 603, ___, 119 S. Ct. 1692, 1701 (1999). While President Trani can be expected to abide by clearly established and well-settled law, he cannot be expected to divine the outcome of Supreme Court decisions that are announced months after he acts. To suggest otherwise is to require every public official to consult a legally accurate crystal ball.

The petitioner's argument against qualified immunity consists largely of her assertions that this case is controlled by *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788 (1985), and *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983). Neither of these cases involved a demand by a speaker to "piggyback" his or her message onto the opposing message of another. Both involved an entirely separate issue of equal

access to channels of communication controlled by government as employer. In both cases, plaintiffs lost.

In sum, assuming *arguendo* that Trani played a role in the exclusion of the petitioner, the Fourth Circuit rightly concluded that such exclusion did not violate clearly established law and that Trani is entitled to qualified immunity.

IV. Dr. Trani Is Entitled to Sovereign Immunity.

Because Trani in his official capacity is entitled to Eleventh Amendment immunity, petitioner's only hope of keeping him in this action was to invoke the exception to immunity found in *Ex parte Young*, 209 U.S. 123 (1908). Both the district court and the Fourth Circuit correctly perceived, however, that the exception does not apply here since Trani is not alleged to be currently engaged in any unlawful activity requiring federal intervention. The Fourth Circuit was correct when it noted that,

> In her amended complaint, DeBauche alleged that Trani conspired to keep her out of Debate Virginia in 1997 and that the defendants, including Trani, 'will either individually or jointly sponsor, plan, promote, manage or hold statewide debates in the future from which candidates of the [Virginia Reform] Party will be excluded and to which only Democratic and Republican candidates will be invited.' While we must, at this motion-to-dismiss stage of the case, accept as true the allegations of DeBauche's complaint, *see Conley v. Gibson*, 355 U.S. 41, 47-48 (1957), her allegations that she or Reform Party candidates will be excluded from future debates do not, as a matter of law, allege

> an ongoing violation of federally-protected rights. Instead, they amount to conjecture regarding discrete future events. **Mere conjecture is insufficient to transform a one-time event into a continuing governmental practice or an ongoing violation.** Accordingly, DeBauche's claim against Trani in his official capacity does not fall within the *Ex parte Young* exception, and we have no reason not to apply the traditional principles of Eleventh Amendment immunity to dismiss the claims against Trani in his official capacity.

A. 9, 10 (emphasis added).

Petitioner's only response to this logic is to suggest that *Green v. Mansour*, 474 U.S. 64 (1985), does not preclude declaratory relief for past violations of federal law. Pet. 22-23. Petitioner simply misreads the facts of that case. *Green v. Mansour* involved a class litigants' unsuccessful attempt to obtain, among other things, declaratory relief to the effect that Michigan officials had misapplied federal law in the past. *Id.* at 69. This Court, balancing the Eleventh Amendment and the Supremacy Clause, recognized that, in the absence of a continuing violation of federal law, even "notice relief" – a benign kind of declaratory relief sought by petitioners in *Mansour* – had the same practical effect for purposes of the Eleventh Amendment as an award of damages. Therefore, such declaratory relief constituted an improper exercise of federal judicial power under the Eleventh Amendment. *Id.* at 73.

V. This Case is Moot.

Finally, DeBauche's demand that she be permitted to participate in an already-concluded political debate is a claim that was moot upon filing in the district court, was moot upon appeal, and remains to this day, stale, incapable of redress, and hopelessly abstract. Petitioner demands, in essence, an advisory opinion from this Court as to whether she should be included in future political debates. The Fourth Circuit correctly ruled that, since no ongoing violation of federal law was alleged, *Ex parte Young* was not applicable to Trani. It also held that Trani was entitled to qualified immunity. A. 9 and 12-17. With no relief available to her, there is no actual case or controversy. Nor can this case be deemed "capable of repetition yet evading review." Assuming *arguendo* that she is likely to run for public office once again, there is no basis to conclude that VCU is likely to host another debate in the same year as her campaign and for her particular race, and that she would again be so late to enter the contest as to result in the last minute frenzy – and belated lawsuit – that characterized her actions here. Under the general principles articulated in *Los Angeles v. Lyons*, 401 U.S. 95 (1983), this case is moot.

CONCLUSION

Governor Wilder's purpose in organizing and moderating Debate Virginia was to highlight and compare the views of Jim Gilmore and Don Beyer, two gubernatorial candidates. In so doing, he was not carrying out a traditional governmental function, nor did the debate become

a limited public forum when the program found a stage at VCU. Not to reconfigure the debate to accommodate DeBauche's belated candidacy violated no known principle of the First Amendment. Trani offered DeBauche the same use of university resources that VCU made available to the other candidates. The Constitution requires no more. The petition for writ of certiorari should be denied.

Respectfully submitted,

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